Supreme Court, U.S.
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No. 00-1049

IN THE

Supreme Court of the United States

DOUG CASS and ACTIVE APPLIANCE CORPORATION,

Petitioners,

v.

COUNTY OF SUFFOLK and COUNTY EXECUTIVE OFFICES OF CONSUMER AFFAIRS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION FOR RESPONDENT COUNTY OF SUFFOLK

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QUESTIONS PRESENTED

Whether New York State's requirement of commencing a legal action by purchasing an index number and filing papers with the Clerk of the Court is a violation of the Fourteenth Amendment to the United States Constitution.

Whether the fact that the petitioners were required to pay a second index number fee solely due to petitioners' initial error in service and filing of an order to show cause rises to the level of a constitutional violation.

STATEMENT OF THE CASE

On November 18, 1997 the Suffolk County Office of Consumer Affairs (hereinafter referred to as "Consumer Affairs") revoked petitioners' (hereinafter referred to as "Active Appliance") license to engage in the home appliance repair business.

On November 24, 1997, the petitioners attempted to commence a New York State Civil Practice Law and Rules Article 78 proceeding against Consumer Affairs challenging its license revocation. Active Appliance failed to comply with the procedure to properly commence an Article 78 proceeding. It failed to serve and file a petition.

After Consumer Affairs moved to dismiss, Active Appliance tried to commence a new C.P.L.R. Article 78 proceeding on December 22, 1997. It submitted new papers, but used the same index number purchased for the previous proceeding.

The trial court granted judgment in favor of Consumer Affairs. Active Appliance appealed, and the Appellate Division Second Department affirmed the lower court's decision. The New York Court of Appeals denied Active Appliance's motion for leave to appeal.

SUMMARY OF ARGUMENT

This case does not present an issue appropriate for the exercise of this Court's discretionary jurisdiction. The Appellate Division Second Department upheld the Supreme Court's enforcement of the clear language of C.P.L.R. § 304 (method of commencing action or special proceeding), C.P.L.R. § 403 (notice of petition, service, order to show cause) and C.P.L.R. § 7804 (procedure for bringing a special proceeding).

Active Appliance erroneously filed the first time, and because of this mistake on its part, it was required to procure

a new index number on the second attempt. This set of circumstances does not rise to the level of a constitutional violation. No important federal question is presented which needs this court's elucidation or correction.

There is no compelling reason to grant certiorari, and the petition should be denied.

REASONS FOR DENYING THE WRIT

I.
THE COURT BELOW CORRECTLY DISMISSED THE PROCEEDING BASED UPON THE UNAMBIGUOUS LANGUAGE OF THE STATUTES.

New York State Civil Practice Law and Rules § 304 states that in order for a special proceeding to be commenced, a Notice of Petition or Order to Show Cause with Petition must be filed with the Clerk (C.P.L.R. § 304 [McKinney 1999]).

C.P.L.R. § 7804 [McKinney 1994] indicates that a proceeding to review an administrative determination shall be brought via the method to commence a special proceeding.

Failure to strictly comply with the requirements of the Civil Procedure Law and Rules for commencing a proceeding must result in dismissal. *Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 658 N.Y.S.2d 205, 680 N.E.2d 578 (1997); *Gershel v. Porr*, 89 N.Y.2d 327, 653 N.Y.S.2d. 82, 675 N.E.2d 836 (1996). Active Appliance attempted to commence a special proceeding by filing a bare Order to Show Cause. This attempt was not in compliance with the Civil Procedure Law and Rules and therefore required dismissal. *See*, *Gershel v. Porr*, *supra.*

The petitioners' second attempt at commencing the proceeding was equally defective. Active Appliance filed a new Notice of Petition and Petition, with a new return date, but used the same index number from the prior defectively

commenced proceeding. Active Appliance's failure to purchase a new index number for the new proceeding was a fatal flaw requiring dismissal. *Fry v. Tarrytown, supra*; *Gershel v. Porr, supra*; *Heins v. County of Suffolk Dept. of Civil Service*, 248 A.D.2d 537, 669 N.Y.S.2d 904 (2d Dept. 1998); *Vetrone v. Mackin*, 216 A.D.2d 839, 628 N.Y.S.2d 866 (3d Dept 1995).

II.

THE PROVISIONS OF STATE LAW WHICH GOVERN COMMENCEMENT OF SPECIAL PROCEEDINGS DO NOT VIOLATE PETITIONERS' DUE PROCESS RIGHTS.

There is no due process violation in requiring a litigant to commence a proceeding by following a regulatory scheme. *See*, *Gronne v. Abrams*, 793 F.2d 74 (2d Cir. 1986); *Werner v. State of Utah*, 32 F.3d 1446 (10th Cir. 1996). Active Appliance attempts to raise a claim by indicating that New York State law requires the payment of two separate fees for the same action. This assertion is incorrect. Initially, the petitioners failed to commence a proceeding pursuant to the New York C.P.L.R. § 304 because he did not file a complaint or petition. A motion or order to show cause without an underlying pending action or proceeding is a nullity.

Active Appliance was required to purchase a new index number to subsequently file a petition. Petitioners were required to pay two fees because the first filing was improper.

The courts of New York State properly dismissed both proceedings brought by the petitioners because Active Appliance failed to comply with the requirements of the C.P.L.R. in regard to commencement of proceedings. Active Appliance has not been denied its due process rights.

CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT STATUTES

NEW YORK CIVIL PRACTICE LAW AND RULES § 304

§ 304. Method of commencing action or special proceeding

An action is commenced by filing a summons and complaint or summons with notice. A special proceeding is commenced by filing a notice of petition or order to show cause and a petition. Where a court finds that circumstances prevent immediate filing, the signing of an order requiring the subsequent filing at a specific time and date not later than five days thereafter shall commence the action. For purposes of this section, and for purposes of sections two hundred three and three hundred six-a of this chapter, filing shall mean the delivery of the summons with notice, summons and complaint, notice of petition or order to show cause to the clerk of the court in the county in which the action or special proceeding is brought or any other person designated by the clerk of the court for that purpose together with any fee required as specified in rule twenty-one hundred two of this chapter for filing. At such time of filing, the original and a copy of such papers shall be date stamped by a court clerk who shall file the original and maintain a record of the date of the filing and who shall immediately return the copy to the party who brought the filing.

Appendix

NEW YORK CIVIL PRACTICE LAW AND RULES § 403

§ 403. Notice of petition, service; order to show cause

(a) Notice of petition. A notice of petition shall specify the time and place of the hearing on the petition and the supporting affidavits, if any, accompanying the petition.

(b) Time for service of notice of petition and answer. A notice of petition, together with the petition and affidavits specified in the notice, shall be served on any adverse party at least eight days before the time at which the petition is noticed to be heard. An answer and supporting affidavits, if any, shall be served at least two days before such time. A reply, together with supporting affidavits, if any, shall be served at or before such time. An answer shall be served at least seven days before such time if a notice of petition served at least twelve days before such time so demands; whereupon any reply shall be served at least one day before such time.

(c) Manner of service. A notice of petition shall be served in the same manner as a summons in an action.

(d) Order to show cause. The court may grant an order to show cause to be served, in lieu of a notice of petition at a time and in a manner specified therein.

Appendix

NEW YORK CIVIL PRACTICE LAW AND RULES § 7804(a)

§ 7804. Procedure

(a) Special proceeding. A proceeding under this article is a special proceeding.

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